

## NEVADA COURT OF APPEALS

# Keolis Transit Services, LLC v. Eighth Judicial District Court (Toth)

Keolis Transit, 2022 NV 8 (Nev. Ct. App. 2022) · No. 81637-COA · Decided February 24, 2022

### SUMMARY

The Nevada Court of Appeals considered a writ petition challenging an order compelling disclosure of an insurer's surveillance videos and related reports in a personal-injury action. It held that two videos and a related report created before suit, without direction from counsel, were not protected work product under Nevada precedent. The court held that a third video and report created at counsel's direction after suit were work product, but remanded for the district court to determine whether substantial need and undue hardship justified discovery.

### CASE DETAILS

|                       |                                                                                                                                                                                 |
|-----------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Nevada Court of Appeals                                                                                                                                                         |
| WRITING FOR THE COURT | Tao, J.; Gibbons, C.J.; Bulla, J.                                                                                                                                               |
| JURISDICTION          | Nevada                                                                                                                                                                          |
| DECIDED               | February 24, 2022                                                                                                                                                               |
| DOCKET                | 81637-COA                                                                                                                                                                       |
| DISPOSITION           | writ_granted                                                                                                                                                                    |
| PROCEDURAL POSTURE    | Keolis petitioned for a writ of prohibition challenging a district court order compelling production of insurer surveillance videos and related reports in a negligence action. |
| STANDARD OF REVIEW    | Discovery rulings are reviewed for clear abuse of discretion, but no deference is owed to legal error; the district court must apply the correct legal standard.                |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                  |
| PARTIES               | Keolis Transit Services, LLC v. Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, Richard Scotti, District Judge                           |

### TOPICS

[discovery dispute](#)[work product doctrine](#)[appellate procedure](#)[writ of certiorari](#)[evidence](#)

## PRACTICE AREAS

civil procedure

discovery

torts

## QUESTIONS PRESENTED

1. Whether the Court of Appeals should exercise extraordinary writ jurisdiction to review the district court's discovery order.
2. Whether surveillance materials created by an insurer before suit are protected work product when they were not created at the direction of counsel.
3. Whether surveillance materials created at counsel's direction after litigation commenced are protected work product.
4. Whether work-product surveillance materials may nevertheless be discoverable upon a showing of substantial need and undue hardship, and whether the district court properly analyzed that exception.

## HOLDINGS

1. The Court of Appeals may exercise writ jurisdiction to review the discovery order because the petition presented an important legal issue requiring clarification and disclosure of potentially protected work product could not be fully remedied by a later appeal.
2. The first two surveillance videos and related report were not protected work product because they were created by the insurer before suit without showing that they were created at the direction of Keolis's counsel.
3. The third surveillance video and related report were protected work product because they were created at the direction of counsel after Toth filed suit and therefore were prepared for trial.
4. The Court of Appeals could not determine the ultimate discoverability of the third video and related report because protected work product may be discovered upon a showing of substantial need and undue hardship, and the district court failed to conduct that analysis.

## KEY QUOTATIONS

*“Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative” (5)*

*“insurance investigation materials are created in anticipation of litigation, and are therefore protected work product, only when they are created at the direction of counsel under circumstances demonstrating that counsel's involvement was reasonable and not for the mere strategic purpose of obtaining work-product protection for routinely created materials.” (9)*

*“When materials meet the requirements for protection under the work-product doctrine, they may still be subject to discovery upon a showing by the requesting party of substantial need and undue hardship under NRCP 26(b)(3)(A).” (11)*

## FACTUAL BACKGROUND

Keolis employee Andre Petway rear-ended Shay Toth, who alleged serious personal injuries and retained counsel. Before Toth filed suit, Keolis's insurer obtained an ISO report and commissioned two surveillance videos and a related report, apparently without direction from Keolis's counsel. After Toth filed suit, Keolis's counsel directed a further investigation that produced a third surveillance video and related report.

## PROCEDURAL HISTORY

The discovery commissioner initially treated the surveillance materials as work product, subject to disclosure if Keolis intended to use them at trial. On Toth's objection, the district court ordered Keolis to immediately produce all three videos and both reports in a one-sentence footnote. Keolis sought interlocutory writ relief, and the Court of Appeals granted the petition in part and directed further proceedings.

## DISPOSITION

writ\_granted

## REMAND INSTRUCTIONS

The district court must vacate its order compelling production of the third video and related report, reconsider Toth's motion to compel under the work-product framework described in the opinion, determine whether substantial need and undue hardship justify discovery, and impose appropriate protections against disclosure of counsel's mental impressions, conclusions, opinions, or legal theories. The first two videos and related report are to be produced.

## CASES CITED

- Diaz v. Eighth Judicial District Court, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000)
- Business Computer Rentals v. State Treasurer, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998)
- Wynn Resorts, Ltd. v. Eighth Judicial District Court, 133 Nev. 369, 373-74, 384, 399 P.3d 334, 341, 348 (2017)
- Venetian Casino Resort, LLC v. Eighth Judicial District Court, 136 Nev. 221, 223 n.3, 467 P.3d 1, 4 n.3 (Ct. App. 2020)
- Canarelli v. Eighth Judicial District Court, 136 Nev. 247, 251, 257-58, 464 P.3d 114, 119, 122-23 (2020)
- In re Guardianship of B.A.A.R., 136 Nev. 494, 496, 474 P.3d 838, 841 (Ct. App. 2020)
- Ballard v. Eighth Judicial District Court, 106 Nev. 83, 84-85, 787 P.2d 406, 407 (1990)
- Columbia/HCA Healthcare Corp. v. Eighth Judicial District Court, 113 Nev. 521, 526-27, 936 P.2d 844, 848 (1997)
- In re Grand Jury Subpoena (Mark Torf/Torf Environmental Management), 357 F.3d 900, 907 (9th Cir. 2004)
- United States v. Adlman, 134 F.3d 1194, 1202 (2d Cir. 1998)
- Wardleigh v. Second Judicial District Court, 111 Nev. 345, 358-59, 891 P.2d 1180, 1188-89 (1995)
- Fletcher v. Union Pacific Railroad Co., 194 F.R.D. 666, 670 (S.D. Cal. 2000)
- Marchello v. Chase Manhattan Auto Finance Corp., 219 F.R.D. 217, 219 (D. Conn. 2004)
- Ex parte Doster Construction Co., 772 So. 2d 447, 451 (Ala. 2000)

- Cabral v. Arruda, 556 A.2d 47, 50 (R.I. 1989)
- Chiasson v. Zapata Gulf Marine Corp., 988 F.2d 513, 515-16 (5th Cir. 1993)
- Mitchell v. Eighth Judicial District Court, 131 Nev. 163, 176, 359 P.3d 1096, 1104 (2015)
- Las Vegas Sands v. Eighth Judicial District Court, 130 Nev. 643, 656, 331 P.3d 905, 914 (2014)

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